Supreme Court, U.S.
FILED
JAN 28 2003
OFFICE OF THE CLERK

(3)

No. 02-765

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, CALIFORNIA HIGHWAY PATROL, DWIGHT HELMICK, and EDWARD GOMEZ,

Petitioners,

v.

JEFF D. PAIGE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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15 pp

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Respondent's argument for why the Court should not grant certiorari boils down to the dangerous proposition that plaintiffs should have nearly unfettered leeway in the statistical evidence they may present to a trier of fact in a Title VII disparate impact case. So it is that respondents defend the Ninth Circuit's decision as "unexceptional," notwithstanding the unprecedented and unjustifiable aggregation of statistical data that the decision authorizes – across distinct job categories, across distinct examinations, across distinct racial categories, and stretching back indefinitely in time without regard to the statutory limitations period. After all, respondents claim, the trier of fact can still determine "the relative weight of the parties' competing statistical theories." Op. at 2.

This lax approach to Title VII disparate impact litigation begs the crucial question: As a matter of law, what statistical evidence may a trier of fact properly consider in evaluating a disparate impact claim? The Court has several times recognized the need to police the boundaries of admissible statistical evidence in Title VII cases. *See, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazelwood School District v. United States*, 433 U.S. 299 (1977). And, more specifically, the Court has repeatedly admonished, including most recently just last Term in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that lower courts in Title VII cases must not use time-barred events to create liability that would not otherwise exist. The Court should grant review here because the Ninth Circuit's decision, far from being "unexceptional," violates the Court's approach to the proof of disparate impact claims, undermines the integrity of disparate impact analysis, and is at odds with the decisions of several courts of appeals.

I. The Conflict Between The Ninth Circuit's Decision And This Court's Holdings Cannot Be Avoided On The Grounds That The Propriety Of Using Time-Barred Data Is Solely A Matter Of The Weight To Be Given Such Evidence

In defending the Ninth Circuit's ruling authorizing the use of pre-liability period data to prove disparate impact within the liability period, respondents characterize the Ninth Circuit's holding as being only that "evidence of statistical trends from outside the limitations period may be used when relevant to understanding employment practices that, because they occurred within the limitations period, are properly subject to challenge." Op. at 4. The Ninth Circuit, however, did not merely approve the use of time-barred data in order to establish "trends" that help to "understand" timely challenged events. The methodology approved by the court combined the results of time-barred examinations with the results of examinations within the liability period, and drew no distinction between the two. The resulting statistical analyses did not in any sense measure the impact of only the timely challenged examinations. Instead, the approved analyses measured the combined impact of all examinations, however distinct and without regard to their timeliness. This methodology did not establish the existence of a "trend" or shed any light on the independent impact of the different examinations within the liability period; it disregarded the legal significance of the liability period entirely.

Nor can the inclusion of pre-liability period data be justified on the grounds that, without such data, meaningful statistical analysis would not be possible. Op. at 5 n.1, 11 n.6. The Ninth Circuit did not base its decision on any alleged insufficiency of liability period data. And contrary to respondents' representation, they *never* even claimed, much less provided evidence to show, that sample sizes within the liability period were too small to

permit meaningful analysis.[1] Notably, even small sample sizes within the liability period could not justify including in statistical analyses the results of examinations that were not timely challenged, affected no decisions within the liability period, and differed in content, application rates, and success rates, from the examinations properly at issue. In these circumstances, statistical analyses including pre-liability period examination results provide no relevant information about the impact of examinations within the liability period, and nothing about the theoretical inadequacy of sample sizes within the liability period can possibly render the use of time-barred examination results any more relevant, or any less a violation of the statutory requirement that allegedly discriminatory selection devices be timely challenged.[2]

Respondents' argument that the Ninth Circuit's ruling authorizing the use of pre-liability period data to prove disparate impact within the liability period does not conflict with the Court's decisions in *Morgan*, *Delaware State College v. Ricks*,

1. Although respondents assert that they submitted evidence, "including expert opinion," that the sample sizes would be too small to permit statistical analysis if limited to data within the limitations period, Op. at 5 n.1, no such evidence appears in the record. The record citation provided by respondents to support their statement contains only their statistical witness's opinion that including data from examinations outside the liability period establishes statistically significant disparities that do not exist if only examinations within the liability period are included. On the other hand, petitioners' statistical expert testified without contradiction that the sample sizes were all large enough to permit meaningful statistical analysis.

2. Respondents are simply wrong in their contention that agreement with petitioners' arguments would prevent analysis of promotional examinations given prior to the beginning of the liability period even when the results of those examinations continued to govern promotions within the liability period. Op. at 11 n.6. Indeed, petitioners performed just such an analysis, which showed no adverse impact against any minority group in any rank. The untimely examinations challenged by petitioners were administered before the liability period and their corresponding eligibility lists also expired before the liability period.

449 U.S. 250 (1980), and *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), is specious. The Ninth Circuit, which initially relied solely on the continuing violation doctrine to justify its ruling on the use of pre-liability period data, obviously recognized that *Morgan* (which narrowed that doctrine) presented a serious obstacle to using pre-liability period data in the manner plaintiffs sought. That is why, on petition for rehearing in the wake of *Morgan*, the Ninth Circuit deleted its references to the continuing violation doctrine and devised a completely new justification for its use of time-barred data. The court's attempt to recast its decision in evidentiary terms, however, did not change the fact that its ruling permits plaintiffs to use the results of time-barred examinations to prove that timely challenged examinations have a disparate impact, even where the timely examinations, standing alone, show no such impact. In thus permitting time-barred data to serve as a "but for" cause of disparate impact liability, the ruling gives present legal effect to time-barred events in direct contravention of *Morgan*, *Ricks*, and *Evans*.

According to respondents, "[p]etitioners do not assert – and could not assert – that [r]espondents seek relief from time-barred employment decisions: all agree that [r]espondents seek relief only from decisions that occurred during the relevant limitations period and that their suit was timely filed." Op. at 3; *see also id.* at 7-8. The use of pre-liability period data approved by the Ninth Circuit, however, would indeed improperly permit an award of relief based on time-barred events. All respondents can really claim is that they are seeking relief only on behalf of individuals who took examinations that were given during the liability period, and not on behalf of individuals who took only the earlier examinations. But if a finding of adverse impact can be based on statistical analyses that include the results of examinations that were not timely challenged, any award of relief will in fact be based on time-barred decisions, even though the beneficiaries of that relief will not necessarily be the ones who were affected by those decisions.

Respondents also argue that the Ninth Circuit's ruling is supported by the Court's treatment of hostile environment claims in *Morgan*. Op. at 8-9. This argument is particularly disingenuous, because the Court expressly distinguished hostile environment claims from claims based on discrete events, such as promotional examinations, which are capable of independent evaluation. 536 U.S. at 123 ("Hostile environment claims are different in kind from discrete acts. . . . The 'unlawful employment practice' cannot be said to occur on any particular day. . . . [I]n direct contrast to discrete acts, a single act of harassment may not be actionable on its own.").

Respondents further argue that the Court "has never prohibited the use of pre-Act or pre-limitations period data to evaluate the nature of employment practices that occur within the limitations period which are then made the subject of a timely charge by an adversely affected employee." Op. at 10. Respondents' argument is an exercise in misdirection. The Court squarely stated in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), that

> [r]acial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.

Id. at 309. Plainly, in *Hazelwood*, the Court was saying it would be improper to base a finding of liability on analyses that included pre-Act data when the evidence showed no discrimination in the post-Act liability period. *Evans* made clear that an event that is not timely challenged is the "legal equivalent" of an event that occurred before Title VII was passed. *Evans*, 431 U.S. at 558. And contrary to the justification offered by the Ninth Circuit, time-barred events cannot once again become actionable merely because they are "similar" to events within the liability period. "[D]iscrete discriminatory acts are

not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Morgan*, 536 U.S. at 122.

Respondents cite *Bazemore v. Friday*, 478 U.S. 385 (1986), as an example of the Court's approval of the use of time-barred data to evaluate the impact of practices within the period. But *Bazemore* by no means endorsed the use of pre-liability period data that the Ninth Circuit approved in this case. *Bazemore* involved a claim of racial discrimination in salaries, and the evidence showed disparities in pay between black and white workers both before and after the date that Title VII became applicable to public employers. A court of appeals had held that, because the salary disparities had originated before the date Title VII became applicable to public employers, the employer had no obligation to eliminate the disparity. The Court disagreed, explaining that

> [a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.

478 U.S. at 395. Evidence of pre-Act discrimination was admitted in *Bazemore* to explain the origins of the employer's discriminatory practice and its "ineffectual attempts to eradicate it," not to establish the existence of actionable disparities within the liability period, as the Ninth Circuit did here. *Id.* at 401.

Finally, respondents claim that the Ninth Circuit's decision is "fully consistent" with decisions of other courts of appeals "which have frequently considered pre-limitations period selection data when that evidence is relevant to determining whether the same or similar practices within the limitations period have a disparate impact." Op. at 5. Of the seven cases

cited by respondents to support this statement, none identifies the pre-liability period nature of the statistical evidence as an issue. Two do not appear to have relied on pre-limitations period data at all (*Payne v. Travenol Labs, Inc.*, 673 F.2d 798 (5th Cir. 1982); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979)), and three do not contain sufficient information to determine what the limitations period was (*Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980); *Csicseri v. Bowsher*, 862 F. Supp. 547 (D.D.C. 1994), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995); *Denny v. Westfield State College*, 669 F. Supp. 1146 (D. Mass. 1987)). In the other two cases, it does not appear that the employer challenged the use of time-barred data, and the decisions therefore provide no meaningful support for the Ninth Circuit's ruling.

Moreover, all but one of the cases cited by respondents involved claims of disparate treatment rather than disparate impact.[3] Unlike disparate impact cases, disparate treatment cases require a showing that the employer intended to discriminate, and the use of pre-liability period events to establish such intent may sometimes be proper. In such circumstances, pre-liability period events are not being used to create a false appearance of statistical disparity within the liability period, but rather to establish knowledge or state of mind during the liability period based in part on conduct before the liability period began. *See* Pet. at 19-21 (circuit conflict with *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395 (2d Cir. 1981)). In disparate impact cases, on the other hand, the ultimate issue is whether a "particular employment practice" within the liability period causes a disparate impact against a protected group, *see* 42 U.S.C. § 2000e-2(k)(1)(A)(i), and the requirement of particularity precludes using data that does not actually bear on the practice at issue. Here, because each examination is different in content, has different applicant and success rates, and affects

3. Only *Grant v. Bethlehem Steel Corporation* involved a disparate impact claim, but as noted above, that case does not contain sufficient information to determine what the limitations period was.

promotion decisions only for a limited period of time, the results of time-barred examinations cannot even theoretically serve to measure the impact of examinations within the liability period.

II. Respondents Cannot Reconcile The Statistical Aggregation Approved By The Ninth Circuit With Prior Decisions Of This Court And The Eleventh Circuit

Respondents fail to come to grips with petitioners' argument that, by authorizing aggregation of data from different promotional examinations and different ranks into a single pool, the Ninth Circuit's opinion runs afoul of this Court's holding in *Wards Cove*, which requires a separate disparate impact analysis for every job category, "even where workers for the different positions may have somewhat fungible skills." 490 U.S. at 653.

Here again, respondents seek to dull the jarring impact of the Ninth Circuit's decision with the soothing mantra of "don't worry, it's all just a battle of the experts." To this end, respondents cite a host of cases in which courts have let the trier of fact weigh a statistical analysis that used some form of aggregation. Op. at 12-14.

This is a straw man tactic. No one disputes that, under some circumstances, aggregation is a necessary and appropriate statistical tool. The question raised by the Ninth Circuit's ruling is more circumscribed, though still broadly important. Where plaintiffs claim that a specific selection device creates a disparate impact, can plaintiffs prove their case by lumping together data gleaned from different selection devices used to screen for different jobs? And, furthermore, can they do so using the discredited single pool method specifically rejected by the Eleventh Circuit in *Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985)?

The cases respondents cite shed no light on these important issues.[4] The three Court of Appeals decisions, *Ezell v. Mobile*

4. The statistical texts that respondents cite (Op. at 13 n.8) support petitioners' position. For example, in Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* § 5.08 & n.4 (2002), the (Cont'd)

Housing Board, 709 F.2d 1376 (11th Cir. 1983); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647 (5th Cir. 1983); and *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982), all pre-date *Wards Cove*, where the Court clarified the standards for statistical aggregation in disparate impact cases. Thus, any analysis they contain at odds with that decision is necessarily obsolete. In any event, in *Capaci*, the statistical analysis did not aggregate across different job positions or different tests (as the Ninth Circuit authorizes here). Rather, that analysis dealt with selection to a single position (manager trainee) – a position for which no tests were used. *Capaci*, 711 F.2d at 651-56. Neither *Ezell* nor *Paxton* contain a holding on the relevant issue whether aggregated data from distinct examinations given across multiple job categories can be used to prove a disparate impact claim. *Ezell*, 709 F.2d at 1382; *Paxton*, 688 F.2d at 556 n.3. To the extent that both cases rely to some extent on aggregated statistics across job categories, they do so in the very different context of proving a disparate treatment claim (where the defendant's discriminatory intent is an element).

In short, respondents provide no meaningful defense of the Ninth Circuit's approved method of aggregations by which, for example, plaintiffs may prove disparate impact by combining

(Cont'd)
authors expressly distinguish between simple "aggregation" (the method approved by the Ninth Circuit) and statistically combining data across meaningful strata using an appropriate statistical method, noting that the former can create "statistical anomalies" and "can sometimes yield numbers that create an inference of disparate impact . . . in situations where, because data have been improperly aggregated across strata, the inference is questionable." In David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* § 4.12 (1980), the authors discuss the appropriateness of combining multiple "stages" of a single selection process in order to evaluate the impact of the entire process, not applications of different processes. Not only is this discussion irrelevant to the kind of aggregation that the Ninth Circuit approved here, it is arguably rendered inapplicable by the amendment of Title VII in 1991 to require identification of the specific employment practice responsible for any disparity. *See* 42 U.S.C. § 2000e-2(k)(1)(A).

the results of the "in-box" examination used to screen candidates for the rank of captain with the multiple choice examination used for promotion to sergeant. As explained in the petition at 22-25, this kind of aggregation, by combining unrelated tests for distinct job categories, is guaranteed to create irrational results, circumvents the statutory requirement that plaintiffs show that a "particular employment practice" causes a disparate impact, and is contrary to established statistical standards.

Such aggregation, moreover, creates exactly the problem identified in *Wards Cove* – a decision respondents scarcely mention. In a solitary footnote, they seem to suggest that, so long as a plaintiff challenges a specific employment practice, *Wards Cove* permits a plaintiff to show disparate impact using statistics from a set of totally separate employment practices. Op. at 14 n.9. Respondents do not explain how that assertion squares with *Wards Cove* generally or, more specifically, its admonition that "[r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions." 490 U.S. at 653.

Finally, respondents do not even address either the circuit split created by the Ninth Circuit's endorsement of the "single pool" method of aggregation, *see Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985), or petitioners' argument that the lumping of all minority groups into a single statistical category is at odds with the Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Nor is there an effective rejoinder to either point.

CONCLUSION

For the last nine years, this case has been litigated on the basis of one inappropriate statistical theory after another. In the absence of Supreme Court review, the Ninth Circuit decision will perpetuate the injustice in the current case and will consign future cases to a similar fate. We respectfully request that the Court grant the Petition for Certiorari.

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